THE ROLE OF CONGRESS IN DETERMINING INCIDENTAL POWERS OF THE PRESIDENT AND OF THE FEDERAL COURTS: A COMMENT ON THE HORIZONTAL EFFECT OF "THE SWEEPING CLAUSE"

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> *Congress* shall have power to make all laws which shall be necessary and proper to carry into execution . . . all . . . powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.
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> U.S. Const., art. I, § 8, cl. 18 (emphasis added)

> Loose and irresponsible use of adjectives colors all nonlegal and much legal discussion of presidential powers. "Inherent" powers, "implied" powers, "incidental" powers, "plenary" powers, "war" powers and "emergency" powers are used, often interchangeably and without fixed or ascertainable meanings . . . .[1]
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> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by *parliamentary* deliberations.
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> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.
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> Mr. Justice Jackson, concurring in *Youngstown Sheet & Tube Co. v. Sawyer* (emphasis added).[2]

I. INTRODUCTION

Our recent years have been a halcyon period of constitutional debate over the implied and incidental powers of the presidency. While other presidents had individually laid claim to certain very broad prerogatives, rarely were so many different kinds of implied executive power asserted and challenged during a single President's administration as during the Nixon years. Even a brief list of the

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[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646-47 (1952).

[2] 343 U.S. at 655.

Nixon cases is an impressive one. They are shadowed on one side by the extraordinary summer session of the Supreme Court which rebuffed the executive attempt to suppress the publication of the Pentagon Papers.[3] They are closed out at the other end by the climactic order of the Supreme Court which pried loose additional pieces of the Watergate Tapes—the release of which at once ended the President's last vestiges of support in the House of Representatives.[4] Linked with the first of these decisions was the subsequent trial of Daniel Ellsberg, a trial aborted because of executive failure to disclose information deemed pertinent to the defense.[5] Connected with the second decision was a series of companion lower court cases, including two which rejected congressional requests for the tapes, ruling first against the Senate Select Committee's demand,[6] and then against a later attempt under reformulated committee authority.[7] Another addressed itself to the dismissal of Special Prosecutor Cox,[8] and still another withheld general release of the tapes held by the district court under the Supreme Court's decision in *United States v. Nixon*.[9]

Within the same general period, the executive's claimed exemption from the judicial requirements of the fourth amendment was tested—and found wanting—in respect to surveillance of alleged domestic subversives.[10] The claim of a near-absolute impoundment power was tested nearly two dozen times in lower courts.[11] The scope of the executive war-making power was repeatedly challenged, albeit with no willingness by the Supreme Court to examine even the justiciability of the dispute.[12]

Prompted by investigative news reports, suits were also brought (without success) to test the licitness of domestic surveillance by the Army,[13] and to ascertain the real budget of the C.I.A.[14] Even the

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[3] New York Times Co. v. United States, 403 U.S. 713 (1971).

[4] United States v. Nixon, 418 U.S. 683 (1974). *See Symposium on United States v. Nixon*, 22 U.C.L.A.L. REV. 4 (1974).

[5] N.Y. Times, May 12, 1973, at 1, col. 8; *id.*, at 14, col. 5.

[6] Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51 (D.D.C. 1973).

[7] Senate Select Committee on Presidental Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

[8] Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

[9] Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975).

[10] United States v. United States District Court, 407 U.S. 297 (1972). *See also* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), rev'g 363 F. Supp. 936 (D.D.C. 1973).

[11] *See* Train v. City of New York, 420 U.S. 35 (1975), and cases cited at note 15.

[12] *See, e.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

[13] Laird v. Tatum, 408 U.S. 1 (1972).

[14] United States v. Richardson, 418 U.S. 166 (1974).

reach of the "pocket veto" power was challenged in a *pro se* action by Senator Kennedy. The suit proceeded successfully through the level of a federal court of appeals,[15] only to be frustrated by the decision of the Solicitor General not to seek review in the Supreme Court, even as the President continued to exercise the alleged power under circumstances inconsistent with the rationale of the appellate decision.

Several of the most publicized executive claims, *e.g.*, the blunt rejection of the House Judiciary Committee subpoenas, and the allegations of personal presidential involvement in unconstitutional invasions of various civil liberties and in the obstruction of justice, were tested in a different kind of "court," precipitating the most extended debate of the impeachment power the country has known. All in all, not since Reconstruction were the press, the public, Congress and the courts so overwhelmed by constitutional imbroglios of executive authority in such a very brief span.

Still, to call these years "halcyon years" may seem dismally misplaced, as though one finds an incorrigible pleasure in the nation's problems simply because those problems also rekindled a popular interest in a variety of constitutional questions. In proper perspective, no doubt the more serious issue was not whether this act by Mr. Nixon, or that omission by Mr. Nixon, ran afoul of one or another constitutional restraint. Rather, the general issue raised by the aggregate of presidential actions was whether, by encouragement as well as by drift, the nation in general had made it altogether too likely that the kinds of things that did occur could happen so easily. More specifically, had we ourselves contributed to the growth and hazard of an imperial presidency, by celebrating the virtues of a modern executive and by denigrating the ineptitude of Congress?

Much learned writing over a period of decades had appeared to explain not only the evident drift toward executive power, but also to rationalize the rightness and inevitability of that drift.[16] The sheer

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[15] Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

[16] *See* J. BELL, THE PRESIDENCY: OFFICE OF POWER (1967); W. BINKLEY, PRESIDENT AND CONGRESS (Vintage ed. 1962); J. BURNS, PRESIDENTIAL GOVERNMENT (1966); M. CUNLIFFE, AMERICAN PRESIDENTS AND THE PRESIDENCY (1968); E. HARGROVE, PRESIDENTIAL LEADERSHIP (1966); F. HELLER, THE PRESIDENCY (1962); P. HERRING, PRESIDENTIAL LEADERSHIP (1940); E. HUGHES, THE LIVING PRESIDENCY (1973); H. LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION (1940); L. KOENIG, THE CHIEF EXECUTIVE (1964); C. ROSSITER, THE AMERICAN PRESIDENCY (2d ed. 1960); C. ROSSITER, CONSTITUTIONAL DICTATORSHIP (1948); C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF (1975); *But see* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 (4th ed. 1957); H. FINER, THE PRESIDENCY: CRISIS AND REGENERATION (1960); C. PATTERSON, PRESIDENTIAL GOVERNMENT IN THE UNITED STATES (1947); G. REEDY, THE TWILIGHT OF THE PRESIDENCY

unmanageable bulk of the House of Representatives, the revolving two-year terms of its members, and their constant dependency upon narrowly self-interested constituencies were repeatedly contrasted with the more nationally representative character of the President as Chief Executive and leader of his party. The superior organization of the executive, seen as more able to command, to integrate information and to formulate policy in the national interest, was often commended for its virtues. The debilitating influence of veto groups in congressional affairs and the shortcomings of government by gerontocracy in the congressional committee system were disparaged for their vices.

Because of these strong feelings that the executive was more representative, expert, efficient and detached, and less dependent upon inveigling interest groups, Congress was repeatedly encouraged to transfer authority and depend upon presidential initiative.[17] Whatever its weak tendencies, Congress was invited to succumb to them, in part by arrangements of modern legal doctrines enabling Congress to relieve itself of the tasks (and onus) associated with the obsolete notion of 1789 that Congress, not the President, would be *primus inter pares* among the three departments of national government. The federal courts, for example, cooperated very generously in sustaining all contested delegations of power after *Panama Refining Co. v. Ryan*,[18] and even the few courts willing to treat the war power clause

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(1970); A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); R. TUGWELL, THE ENLARGEMENT OF THE PRESIDENCY (1960); D. VINYARD, THE PRESIDENCY (1971). *See also* A. SCHLESINGER, JR. & A. DE GRAZIA, CONGRESS AND THE PRESIDENCY: THEIR ROLE IN MODERN TIMES (1967) (debates); R. RANKIN, THE PRESIDENCY IN TRANSITION (1949); S. WARREN, THE AMERICAN PRESIDENCY (1967) (collections of essays, supporting both views).

[17] One of the less visible but more important examples of this is the executive's superior command in the preparation of the budget, a task to which Congress' committee review is presently unequal, which can be seen as marking the locus of real initiative.

[18] 293 U.S. 388 (1935). *See also* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); California Bankers Ass'n v. Schultz, 416 U.S. 21, 90-91 (1974) (Mr. Justice Douglas dissenting):

> I also agree in substance with my Brother BRENNAN'S view that the grant of authority by Congress to the Secretary of the Treasury is too broad to pass constitutional muster. This legislation is symptomatic of the slow eclipse of Congress by the mounting Executive power. The phenomenon is not brand new. It was reflected in *Schechter Corp. v. United States*, 295 U.S. 495. *United States v. Robel*, 389 U.S. 258, is a more recent example. *National Cable Television Assn. v. United States*, 415 U.S. 336, and *FPC v. New England Power Co.*, 415 U.S. 345, are even more recent. These omnibus grants of power allow the Executive Branch to make the law as it chooses in violation of the teachings of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, as well as *Schechter*, that lawmaking is a congressional, not an Executive, function.

See also E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 (4th ed. 1957) at 9:

as justiciable readily found sufficient congressional acquiescence to sustain every executive decision.

The federal judiciary doubtless occupies but one small corner in the development of the fullness of executive power, but it is nonetheless true that the judiciary's ready acquiescence has been a substantial contributing influence in that development. It is, after all, the duty of the courts to declare in the course of adjudication, the breadth of each express, enumerated executive power and to give (or to deny) a separate scope of independent meaning to "the executive power" that is vested in "a President."[19] It has also been the courts' lot to consider claims of "inherent" executive power, and to mark out lines on claims of "implied" or "incidental" executive power.[20] Similarly, there is a considerable judicial history regarding the necessity for antecedent acts of Congress as a prerequisite of executive action, as well as the complementary issue of the extent to which Congress might go in legislating against executive action. Further, in construing acts of Congress relied upon by the executive, the federal judiciary has clearly affected the executive power by the breadth or conservatism of its statutory constructions. And plainly, the extent to which the courts have allowed nonspecific delegations of authority by Congress to the President, as well as the courts' readiness to find such authority implied by the mere passivity of Congress have necessarily affected the balance and distribution of power within the national government.

Given this widespread view that the Constitution ought not to be bound to the simplicity of government in 1789, and given further the apparent confirmation by political science of the value of a freer executive over the ill-structured decrepitude of Congress, there could be only praise of the Supreme Court for recognizing the realities and for conforming judicial (and constitutional) doctrine accordingly. Thus, for the most part, judges who found good reason to sustain the transfer of authority away from Congress received praise and encouragement for their practical enlightenment in giving breathing room to the needs of the country and for recognizing the wisdom of allowing non-elected experts to make the law. On the other hand, judges

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> The doctrine of the Separation of Powers comprises . . . one of the two great structural principles of the American constitutional system; and from it certain other ideas follow logically, even though not inevitably: . . . thirdly, that none of the departments may abdicate its powers to either of the others. [This idea] has today almost completely disappeared as a viable principle of American constitutional law.

[19] See note 98 *infra* and accompanying text.

[20] *See* Meyers v. United States, 272 U.S. 52 (1926) *and* United States v. Nixon, 418 U.S. 683 (1974), and cases cited therein.

who constrained divisions of national power within a more rigid, less yielding 1789-type model were frequently derided as having forgotten that it was a constitution being expounded, *i.e.* a document that to be enduring must also be progressive and capable of responding to vastly altered circumstances.

It may very well be that all these things should continue, and that the present pause in our thinking is merely a transient reaction to the trigger word WATERGATE. Some proposals do seem substantially of that ill-considered kind, *e.g.*, the proposal to separate the whole of the Department of Justice from control of the President—putting outside the President's power the determination of antitrust, tax, criminal, civil, and civil rights enforcement policies (to name but a few), in order to avoid any president's political manipulations of enforcement policy in those areas. Aside from the suggestion that such legislative efforts to fragment "the" executive power (which the Constitution vests wholly in "a" President) might be unconstitutional regardless of their desirability,[21] even many of those most disaffected by Watergate see proposals such as this one as manifestly excessive.[22] But the fact that such extreme proposals have been made in earnest may also be sobering in a larger sense—that we ought not be too quick to reverse the judicial "progressivism" steadily urged upon the courts at least since the Great Depression.

In spite of all this, however, one can't help becoming interested again in the old questions of judicial treatment of the horizontal distribution of national power. This essay, arising from a particular uneasiness with the judiciary's treatment of "incidental" executive power, is one narrow and highly tentative result.

Put briefly, I think that there is a reasonable basis for questioning the very permissive view the executive has assumed in respect to the proper source and scope of incidental executive power. A fair case may be made that this power may be, constitutionally, far more dependent upon a requirement of congressional determination than has been commonly supposed. A textual source of this dependency may rest in the relatively unexamined second half of the very best known clause in the Constitution—the necessary and proper clause. What I should like to do is to provide the outline of a fair argument for its more conscientious use. I hope to demonstrate that this part is neither a mere redundancy which adds nothing to the document,

[21] *See* Van Alstyne, *A Political and Constitutional Review of United States v. Nixon*, 22 U.C.L.A.L. REV. 116, 130-40 (1974).

[22] *See, e.g.*, testimony by Archibald Cox opposing this proposal, in the Ervin Committee hearings.

nor simply a loose acknowledgment that Congress may affirmatively limit the reach of incidental executive or judicial powers. Rather, I will contend that this clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are literally indispensable, rather than merely appropriate or helpful, to the performance of their express duties under articles II and III of the Constitution.

II. THE SUGGESTED HORIZONTAL EFFECT OF THE NECESSARY AND PROPER CLAUSE

It may be helpful to review at the outset certain ancillary executive (and judicial)[23] powers that have been of recent concern. A review of the treatment of these claims of incidental power in the courts, contrasted with their treatment under an approach that assigns a more significant responsibility to Congress, may help reveal the implications in the obscure half of the necessary and proper clause.

The most obvious current illustration of an implied executive power is that of "executive privilege."[24] Presidents have taken the view that just as Congress may make provision for all things it reasonably deems necessary and proper in aid of its own enumerated powers granted in article I of the Constitution, so also may the President, in aid of the enumerated executive powers granted in article II. Thus as the establishment of a privilege of executive confidentiality might encourage additional candor of communication within the executive department, thereby helping the President in the discharge of his constitutional duties, it must obviously be within the discretion of the President to provide for such a privilege on his own initiative. Or so, at least, the claim has been asserted.[25]

The usual course of judicial review of claims of executive privi-

[23] I mean to include the courts in this discussion for two reasons: first, the better to test the neutrality of the argument to be advanced, *i.e.* that the argument does not trade upon the current uneasiness about executive power alone, but that its acceptability is to be judged equally in respect to the judiciary, to which it may equally apply; and second, because at least as many of the very few early illustrations of the (horizontal) effect of the sweeping clause were given in reference to the judiciary as in reference to the executive.

[24] The subject is extensively reviewed in R. BERGER, EXECUTIVE PRIVILEGE (1974); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); *Symposium on United States v. Nixon*, 22 U.C.L.A.L. REV. 4 (1974); Dorsen and Shattuck, *Executive Privilege, The Congress and The Courts*, 35 OHIO ST. L.J. 1 (1974); Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044, 1288 (1965).

[25] *See, e.g.*, United States v. Burr, 25 F. Cas. 187 (No. 14,694) (C.C. Va. 1807); R. Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A.L. REV. 1044 (1965).

lege has not quarreled with this view of implied (or incidental) executive power. In fact, it appears to be very much in accord with it. The claim is not allowed absolute sway, but it is given keen respect in the course of balancing it against any rival claim for discovery—exactly as Judge Gesell did in respect to the Senate Select Committee,[26] as the Supreme Court did (in dicta) in *United States v. Nixon*,[27] or as was done in *United States v. Reynolds*.[28] And in any case, the legitimacy of its source, *i.e.* an executive desire, is seldom questioned insofar as the privilege is claimed by the President only in respect to the executive department itself.

The rationale underlying the view that the President is not dependent upon Congress for the creation of rules of executive privilege is said to be grounded in the principle of separated powers. Thus a neutral application of that principle would appear to hold that none of the three principal departments of national government should be dependent upon either of the other two in the exercise of ancillary powers and privileges logically related to its separate constitutional responsibilities. (Even so, each department may, of course, ultimately have to depend upon the cooperation of the others to carry out its own design).

This claim of co-equal authority to initiate ancillary rules and privileges within each department can also be supported by an argument of analogy. It seems sensible that insofar as Congress has great latitude of legislative discretion in respect to its express powers pursuant to article I, the executive and judiciary must surely possess a similar initial latitude of discretion in respect to their express powers pursuant to articles II and III. Thus, as Congress may range quite far (*see, e.g.*, Marshall's opinion in *McCulloch v. Maryland*[29]), so also may the executive and judiciary.

At least this is allowed, according to the conventional view, by an *initiating* authority within the executive and judiciary to develop rules helpful (albeit not necessarily indispensable) to their duties. Insofar as Congress is acknowledged to be *primus inter pares*, it is only deemed to be so in the event of direct conflict with another department[30]—and sometimes not even then.[31] The point is well

[26] Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C. 1974), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

[27] 418 U.S. 683 (1974). See discussion at Part III of this essay, *infra*.

[28] United States v. Reynolds, 345 U.S. 1 (1953).

[29] 17 U.S. (4 Wheat.) 316 (1819).

[30] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); New York Times Co. v. United States, 403 U.S. 713 (1971). In fact, however, neither case presents a "direct conflict" between an act of Congress and an exertion of executive power. At most, the conflict was

illustrated in one portion of Justice Jackson's famous concurring opinion in *Youngstown Sheet & Tube v. Sawyer*:[32] courts should most readily defer to executive action confirmed by act of Congress; they should generally defer when Congress has been silent (or has appeared silently to have acquiesced);[33] and they should hesitantly defer when Congress has affirmatively denied such authority unless, in the Court's view, Congress has thereby acted to abridge an express or indispensable incidental executive power.[34] The judicial review is highly deferential, *i.e.* likely to sustain the executive claim by a standard of "reasonableness" similar to that applied to acts of Congress supported by the necessary and proper clause, as to an initial claim of executive authority to innovate rules and privileges for its own assistance.[35]

It is not at all difficult to find similar examples of incidental or implied powers in the judiciary. Here, too, a claim of co-equal authority to initiate rules conducive to the judiciary's express powers has sometimes been made, subject only to a limited power of congressional override. The "supervisory" authority of the Supreme Court is a familiar example.[36] A different, very recent, illustration is found in *Bivens v. Six Unknown Named Agents*,[37] which sustained a claim

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"indirect," *i.e.* insofar as Congress had considered the subject matter pertinent to the executive interest and had provided statutory authority only up to a certain point, the omission of Congress to provide any further statutory authority was deemed to reflect a congressional decision against such authority. See also note 25 *supra*.

[31] Myers v. United States, 272 U.S. 52 (1926).

[32] 343 U.S. 579, 635-38 (1952). It is also true, however, that "the opinion of the Court" was written by Mr. Justice Black, and that four of the other Justices (Douglas, Frankfurter, Jackson, and Burton) expressly concurred in that opinion (and not simply in the judgment itself). The opinion of the Court is explicitly supportive of the horizontal effect of the sweeping clause set forth in this essay. *Id.* at 588. *See also* Corwin, *The Steel Seizure Case*, 53 COLUM. L. REV. 53, 56 (1953):

> The pivotal proposition of the opinion is, in brief, that inasmuch as Congress could have ordered the seizure of the steel mills, there was a total absence of power in the president to do so without prior congressional authorization.

[33] United States v. Midwest Oil Co., 236 U.S. 459 (1915).

[34] Myers v. United States, 272 U.S. 52 (1926).

[35] See notes 26-28 *supra* and accompanying text.

[36] For a review and discussion, *see e.g.*, Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965). Professor Hill concludes his article with a sentence which I think may be supported by the thesis of this essay (which itself emphasizes the lack of merely appropriate, ancillary judicial power in the absence of stautory authority). Hill *supra* at 215 states: "If the remedial implications of a statutory or constitutional violation are rationally determinable, and the judiciary exceeds them, then it is the judiciary that is acting lawlessly."

[37] 403 U.S. 388 (1971). For an excellent review of the case, see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

for money damages for a fourth amendment violation even though Congress had made no provision for that kind of remedy. *Bivens* is especially instructive because of the highly specific standard used by the Court in stating its own authority to grant the particular remedy sought in the case, and what it said about that standard. The Supreme Court majority in *Bivens* declared that the Court did not need to reach the question whether the furnishing of money damages would be *indispensable* to the exercise of judicial power, *i.e.* indispensable to the express judicial duty to decide the case in the sense mandated by article III consistent with the fourth amendment. Rather, it was enough that such a remedy was appropriate and, in the absence of an affirmative restriction imposed by Congress, the standard of "appropriateness" was one the Court was implicitly at liberty to use.[38] The similarity of this standard of implied ancillary judicial discretion to the standard applied to Congress under the necessary and proper clause (*i.e.* "appropriate," as Chief Justice Marshall called it in *McCulloch v. Maryland*[39]) is striking. *Bivens* appears to hold that the judiciary possesses much the same discretion to invoke whatever ancillary authority courts may find "necessary and proper" (in the generous sense of that phrase) as Congress may do in respect to its own separate powers as enumerated in article I—or as the President may do in respect to his own powers as enumerated in article II.

Affirmative restrictions subsequently enacted by Congress to limit executive or judicial innovations can doubtless furnish a significant restraint upon the scope of ancillary executive and judicial powers, but they are much less effective in restraining the President and the Court than would be the case if those two departments were unable to engage in "appropriate" innovations without legislative authorization. It is far easier to forestall legislation authorizing the executive or judiciary to act than to muster the necessary majorities to contradict an "established" executive or judicial practice. Would we not conclude that the Congress' role was a far more important one if judicial practice corresponded more closely with the following proposition than with that already described?

> Neither the executive nor the judiciary possess any powers *not essential* (as distinct from those that may be merely helpful or appropriate) to the performance of their enumerated duties as an original matter—and each can exercise a wider scope of incidental power if, but only if, Congress itself has determined such powers to be necessary and proper.

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[38] 403 U.S. at 397, 402-10.

[39] 17 U.S. (4 Wheat.) at 421.

If this (or something reasonably like it) were the test, a proper analysis in most cases would not start from the question whether the President has claimed some incidental authority, which may be logically conducive to but not required by his business, and is not denied by Congress, but rather from this question:

> Has *Congress* seen fit to provide the President with the "incidental" authority he now asserts?

And similarly with regard to the federal courts:

> Has Congress seen fit to provide the federal judiciary with the "incidental" authority the Court has presumed to invoke?

In short, the authorizing role of Congress would be far more crucial to sustain any use of penumbral, incidental, ancillary, or merely useful executive or judicial power, excepting only those incidental powers without which a fair-minded person would conclude that either department would be unable to discharge its express duties. The difference in the outcome of specific cases under this standard would often be considerable, surely, though arguably it would not necessarily be overwhelming. Presumably if pressed, the Supreme Court in *Bivens* might still have reached the same result, by holding that it would be unable to decide the case according to its article III duty and in accordance with the fourth amendment if it were unable to award money damages. Yet, this example illustrates an obvious and important difference in approach; it is at least open to doubt whether the result would be the same under both approaches, especially to the extent that the Court would not deem itself at liberty to innovate freely in the absence of supporting legislation by Congress.

The same can be said in respect to the President. The latitude of executive privilege (or of executive orders, or of executive agreements) which the courts might sustain absent affirmative legislation by Congress would surely be narrower than it is now. Moreover, if a claim of executive privilege could be defended on no higher ground than that it seems "reasonable" or "appropriate" as good policy, it would be clear to the courts that arguments of that kind are solely for Congress to consider. The Court would likely have no more to do with such arguments than when they come up in other cases respecting the wisdom or need for legislative action.[40]

The unmistakably "legislative" nature of the Supreme Court's efforts to resolve the controversies in executive privilege cases leaves

[40] See note 49 *infra* and accompanying text.

one with the uneasy feeling that something is missing. There is, of course, no clause in the Constitution which provides an express basis for a general claim of executive privilege—nothing equivalent to the speech and debate clause in article I[41]—and thus executive claims cannot be tested for their sufficiency against the language, location, relationship, or history of such a provision. The situation is far different in this respect even from the much-maligned decisions of the Supreme Court respecting the open-textured phrases of "due process," "equal protection," or "privileges and immunities" of the fourteenth amendment. In those cases, although it may be argued that the Court has sometimes strained at the text or revised history with its own legislative intentions (as has so often been suggested was true of *Lochner v. New York*,[42] for instance), the criticism scarcely goes so deep as to insist that it is improper or purely gratuitous for the Court to become involved at all. These clauses *are* there, and they inevitably invite tests of their self-executing scope. The federal courts surely do not act gratuitously by entertaining argument to determine the protection such clauses may (or may not) provide. That necessity cannot be pressed, however, in respect to the great variety of incidental power cases the Court has been willing to consider. As a consequence, it is scarcely surprising that the results strike one simply as "good," "bad," or "indifferent," but in any event the principal test is one's notions of sound policy rather than by anything approaching the more certain standards that judges, as distinct from legislators, are supposed to use.

The reasoning of the executive privilege (and other incidental powers) cases does not conform to a tight requirement that the Court be shown that a highly specific privilege of executive secrecy or confidentiality is *essential* to the exercise of some express article II duty or power.[43] Rather, more often than not the discussion within each

[41] For a very recent application of this clause, see Eastland v. United States Servicemen's Fund, 95 S.Ct. 1813 (1975).

[42] Lochner v. New York, 198 U.S. 45 (1905). *Lochner* was overruled in Bunting v. Oregon, 243 U.S. 426 (1917), its standards of judicial review were repudiated in Nebbia v. New York, 291 U.S. 502 (1934), it is abjured in Ferguson v. Skrupa, 372 U.S. 726 (1963) and in North Dakota State Board v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)—and its standards are revived in Griswold v. Connecticut, 381 U.S. 479 (1965). *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969).

[43] For example, the confidentiality of summit negotiations as insisted upon by the other nation, may be necessary in the course of the executive effort to "make" a treaty, without prejudice to the Senate's separate prerogative ratify or to decline to do so without full disclosure of all of the circumstances before it acts.

case is framed in much larger terms scarcely anchored (if at all) to any clause or provision, and with no serious demonstration whatever of the circumstantial *necessity* for the incidental power. The lack of any antecedent legislative expression, compounding the lack of any constitutional clause setting the basis for the power claimed, tends to set the character of such judicial review afloat on its own "legislative" sea. As a result, what one finds is at best a demonstration that the claimed incidental power is determined to be useful to the office, and that its probable utility is not outweighed under the circumstances by the needs of another party for discovery[44]—in the fashion that one would expect to find in the rationale of a statute addressed to the question.

This sort of judicial review stands in marked contrast to that invoked in reviewing the constitutionality of what Congress has already debated and resolved to be necessary and proper. In this case, the Court reviews a rule already arrived at by a political body, not to second guess the wisdom or the general efficacy of the congressional product, but rather "merely" to ascertain its constitutionality as the rule is drawn into actual controversy between antagonistic litigants (one of whom may well be the President or his agent claiming the benefit of that rule). The Court examines it for the limited purpose of determining whether there is so little plausible connection between that rule and any enumerated power of Congress, that even *after* giving full force to the usual presumption of constitutionality, and even *after* giving full deference to Congress' discretion under the necessary and proper clause, the Court cannot help but conclude against the validity of the act as unauthorized (or as otherwise forbidden by the Bill of Rights).

The whole matter has taken on a different complexion, however, in the usual judicial review of executive "implied" prerogatives. The inquiry is frequently indistinguishable from an ordinary legislative debate, and the usual resulting opinion is likely to read no more "judicially" than a good congressional committee report, because that is essentially what it is.

The case of *Myers v. United States*[45] is a very good illustration of the problem (an illustration made even better because the case is nearly a half-century old and not especially controversial just now). The issue confronting Chief Justice Taft in the case was the extent

[44] An excellent illustration is Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).

[45] 272 U.S. 52 (1926).

of an implied executive removal power, and more particularly, its efficacy against an act of Congress requiring the advice and consent of the Senate for the removal of certain officials. The Taft opinion is very long, nearly fifty pages, as were the dissents by McReynolds and Brandeis (with a one-page dissent by Holmes), and overall the opinions in *Myers* are among the most elaborate and scholarly that have been issued in the history of the Supreme Court.[46] For my purposes, however, only a brief portion of the Taft opinion need be considered.

Chief Justice Taft accepted as true that there were no powers vested in the President other than those expressly granted in article II. He believed, however, that each express power carried in its train an uncertain number of implied incidental powers. The executive supremacy of the President in whom "the executive power" was vested, his responsibility to "take care that the laws be faithfully executed," and his express power of nomination (and shared power of appointment), Taft argued, implied an exclusive authority to remove *all* executive officals at will.

At the highest level of the executive subordinate, *i.e.* cabinet officers, Taft had a very strong argument for the application of his view. He was able to point out that in 1789, the very first Congress had held an extended debate on a bill providing for a Department of Foreign Affairs and the appointment of a Secretary of State. He observed that in the course of that debate, James Madison, rightly considered the "father" of the Constitution, cautioned against the use of any language in the bill which would imply Senate control over the removal of a Secretary of State, as Madison thought any such implication would be both very unwise and quite likely unconstitutional as an invasion of exclusive presidential power. By a majority in the House, and by a tie in the Senate (broken by the vote of the Vice President), one or both of Madison's arguments had carried the day in 1789. The bill that was adopted avoided any language which might be read as implying a shared power in the Senate to control the removal of the Secretary of State.

Taft's arguments were similarly compelling as he reviewed the later grand debate concerning impeachment after President Andrew Johnson, contrary to the Tenure of Office Act, presumed to remove Secretary of War Stanton. In respect to both incidents, the argument of an exclusive executive removal power from implied necessity was a compelling one, despite the fact that the original Convention De-

[46] The elaborate preparation of the case is described in E. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION (1927).

bates shed no light at all upon the question and the Federalist Papers dealt with it only lightly.[47] Given the President's own express duties in article II, an argument of Presidential removal power by necessity of the relationship of the parties is not at all unreasonable as to those office holders who work in intimate association with him at the cabinet level, discharging highly discretionary responsibilities at the President's immediate direction and virtually as his alter ego. Considered in light of these facts, the argument in favor of presidential executive supremacy is compelling, so compelling that none of the dissents in *Myers* presumed to take issue with the Chief Justice at this level.

The difficulty in *Myers,* however, was that the office in question was not of this kind. At issue was the removal of Frank Myers, Postmaster of Portland, Oregon, 3,000 miles distant. Myers' term of service was fixed by Congress at four years, and the President could in any case override his decisions. Further, the President might even be able to suspend Myers should exigent cause so persuade him. However, as one aspect of early civil service legislation clearly provided, Myers could not otherwise be removed outright without the Senate's consent. Nevertheless, Chief Justice Taft concluded that, with or without cause, suspension, hearings, or statement of reason, the President had the exclusive power to remove Myers. Thus the principle came to be established that, to this extent, the Constitution itself had enacted the power of an executive spoils system.

The weakness of the Taft opinion is displayed only after he makes his very forceful case with respect to members of the President's own immediate cabinet. From his argument that a removal power is truly indispensable to the President at the highest level of executive relationship, he went on to say less convincingly:

> But this is not to say that there are not strong reasons why the President *should* have a like power to remove his appointees charged with other duties than those above described.[48]

It is here, however, that fair-minded persons are likely to agree that all such "reasons" fell far short of executive necessity. Rather, they were for the most part simply arguments that it might be well for Congress, even in providing for an overall civil service system, to allow a limited exception enabling the President to intervene and unilaterally remove *any* executive officeholder, down through and below the particular post held by Frank Myers.

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[47] THE FEDERALIST No. 77.

[48] 272 U.S. at 135 (emphasis added).

The dissent by Mr. Justice Brandeis in *Myers* is very long and at least as scholarly as that of Chief Justice Taft, and it casts a great deal of doubt upon much that the Chief Justice attempted to show. But the following excerpt from Mr. Justice McReynolds' dissent best makes the point in responding to the Chief Justice's argument:

> [I]t seems useless, if not, indeed, presumptuous, for courts to discuss matters of supposed convenience or policy when considering the President's power to remove.[49]

All such questions of expediency and convenience are the stuff of the *congressional* process and not the business of the judiciary in the exercise of constitutional review. The only reasoning which could support the holding in *Myers* is that absent a total removal authority over the whole of the federal executive bureaucracy the President would be without an *essential* means to perform his duties. If this were so, the power would be supported by reasoning that the power is implied according to one or more of those express duties. Without that argument of necessity, however, the judicial decision, like the brief and argument for the President, could read no better than a good committee report and recommendation for legislation. That, however, is clearly not enough, since no committee had submitted such a recommendation and no such legislation (readily sustainable pursuant to the necessary and proper clause) had been adopted. This alone should have been enough to yield a different holding, and the actual outcome of the case was merely made worse by the additional fact that the only legislation applicable to the controversy stood against the President's claim.

Myers has been an embarrassment to the Supreme Court ever since, I think, although it has never been repudiated. The Court has trimmed it awkwardly by narrowing the definition of "executive" office and by insisting that the principal administrative agencies are "legislative" and "judicial," but somehow not significantly "executive."[50] Even so, this remains one of the areas of Holmes-Brandies dissents that has not yet come 'round. The signal difficulty of *Myers* is that it "constitutionalized" a scope of executive removal power that finds no expression at all in the Constitution, that is far from being self-evidently necessary to discharge any express executive power,

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[49] *Id.* at 204.

[50] *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958). *Cf.* Morgan v. TVA, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). The shaky distinction may owe its success to Corwin's essay cited in note 46, *supra* immediately following the *Myers* case, although it is clear from the essay that Corwin thought that *Myers* itself was basically unsound.

and which Congress had not deemed necessary and proper pursuant to the second half of the sweeping clause in article I.

The meaning of the necessary and proper clause in reference to the role of Congress and the amplification of executive power has been much neglected, I believe, because so much of the original debate and so much of the subsequent litigation of this clause were preoccupied with its vertical effect, *i.e.* the extent to which the sweeping clause authorized congressional legislation in derogation of "states' rights" or in derogation of "personal liberties."[51] There is no surprise in this preoccupation, of course. The central issues of the day were those involving the uncertain consequences of amending the Articles of Confederation to establish a new national government with a far broader range of powers than those given to Congress under the Articles, powers deemed potentially menacing to the states and to personal liberties in the absence of a Bill of Rights.

Even so, some attention *was* given to the horizontal distribution of power within the new national government about to be established, and the sweeping clause is one of several that made Congress *primus inter pares*. This view is supported by the language of the full clause, its placement in article I, the absence of any equivalent in articles II and III, occasional illustrations specifically given of its horizontal use,[52] and by the common sense of the matter in terms of function.

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[51] Characteristic of antifederalist objections to the sweeping clause was the complaint that this clause would enable Congress to use its tax power in a manner which would utterly displace the authority of state legislatures. *See* BORDEN (ed.), THE ANTIFEDERALIST PAPERS (1965) Nos. 17, 32, 33, 46. For similar objections made in the course of the Philadelphia Convention, see II FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, 632, 640 (1911). For such objections made in the course of the Virginia Debates (remarks by Randolph and Mason), see III ELLIOTT'S DEBATES 442, 470 (2d ed. 1936). The background for these anxieties rested only in part upon the particular wording for the clause. The potential range of the clause was feared also because it would displace the restrictive clause of the Articles of Confederation (Article II provided: "Every state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress Assembled"), and because no similar restatement of states' rights (*e.g.*, the 10th Amendment) was provided for in the proposed Constitution.

The most usual response to thse criticisms was to deny that the sweeping clause would have so free-ranging an effect as the critics supposed, and to insist that were Congress to exceed its authority under the clause, the Supreme Court (in an appropriate case) would declare such an act of Congress to be void. *See, e.g.*, III ELLIOT'S DEBATES 443; THE FEDERALIST No. 33.

[52] *See, e.g.*, III ELLIOT'S DEBATES 463-64, remarks by Governor Randolph. Randolph, a delegate to the Convention, originally opposed ratification of the Constitution (because of its ommission of a Bill of Rights), but subsequently urged its ratification in the Virginia Convention, in which the debate was more extensive than in any other state convention.

In Randolph's view, advocates of ratification were disingenuous in asserting that the scope of the necessary and proper clause was extremely limited (*i.e.* that the clause would enable Congress to legislate indispensable means of implementing each express power) because, in his

As I have attempted to indicate above, and want now to observe still again, the judiciary has ordinarily been awkward and uncomfortable in passing upon executive (and judical) claims of ancillary authority unsupported by Acts of Congress. It has been rightly "awkward," not because such claims cannot affect the President's business or the judiciary's business, for clearly they can, but rather because the elements of judgment and compromise entailed in those claims are the very essence of *political* judgment—the natural preserve of legislative determination.

Accordingly, when the best that can be said of a rule of executive or judicial power, whether of confidentiality, removal, remedy, or some other, is that its establishment may be appropriate and helpful to the department; that it is consistent with, albeit not essential, to its function, then it may simply be one more issue constitutionally committed to *Congress* to determine, either by providing for such a

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view, each enumeration of national power itself implied a grant of incidental power *indispensable* to its execution. Thus, to regard the sweeping clause in that manner would be to reduce it to "tautology." Rather, the clause would establish in Congress a wider discretion with respect to means, albeit not an unlimited discretion—very much as John Marshall was to hold later, in United States v. Fisher, 6 U.S. (2 Cranch.) 358 (1804) and in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). What is important, is that Randolph thus acknowledged that a separate substantive power would be granted to Congress by the proposed sweeping clause—and he illustrated his point not simply in reference to what the clause would enable Congress to do in respect to its own enumerated powers, but, specifically, what it would enable Congress to grant to the President, *i.e.* powers incidental to (and not simply indispensable in aid of) executing the enumerated executive powers.

See also IV ELLIOT'S DEBATES 567-68, in which Madison observed (in his Report on the Virginia Resolutions):

> The plain import [of the sweeping clause] is, that *Congress* shall have *all* the incidental or instrumental powers necessary and proper for carrying into execution all the express powers, whether they be vested in the government of the United States, more collectively, or in the several departments or officers thereof.
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> Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, it may be exercised *by Congress*. If it be not, Congress cannot exercise it.

Compare this with Madison's observations about the clause in his discussion of an executive removal power (*id.* at 37), and then with his observations about the clause in his discussion of the incorporation of a national bank (*id.* at 417-18). Mr. Justice Story, in his COMMENTARIES ON THE CONSTITUTION (Book III, ch. 24, § 1243) literally quotes the Madison interpretation from the Virginia Resolutions *supra*, as a statement of his own view of the sweeping clause.

The view that Governor Randolph was describing as disingenuous (because it sought to disarm criticism of the sweeping clause by treating it as trivial or tautologous), was advanced by Hamilton in THE FEDERALIST No. 33. For still another view that the latter half of the sweeping clause was meant to operate as a restriction on the executive power, see I CROSSKEY, POLITICS AND THE CONSTITUTION 381-83 (1953).

rule or by delegating a limited authority for the courts or the executive to provide it for themselves. But provision of one kind or the other must first be made by *Congress*. Correspondingly, the absence of affirmative action by Congress may defeat an assertion of ancillary executive or judicial powers that cannot be defended as having been expressly provided in articles II and III, or as necessarily implied by the nature of the expressed duties of those departments.

One might, of course, regard this as an heretical and "revisionist" treatment of the constitutional principle of separated powers, as though, in the aftermath of Watergate, it seeks excitedly for some way to describe a greater executive dependency upon affirmative acts of Congress than scholarly detachment can honestly condone. Yet there is a marvelous irony in the fact that the most famous judicial quotation respecting the importance of the principle of separated powers was uttered not to show the independence of broad implied executive powers, as one might think, but to show the very opposite. The quotation is the following one:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incidental to the distribution of the governmental powers among three departments, to save the people from autocracy.[53]

The quotation is from Mr. Justice Brandeis' dissenting opinion in *Myers,* in which he, Holmes, and McReynolds held *against* the claim of implied executive independence. What makes the quotation of even greater interest, moreover, is that the Holmes-Brandeis position was not limited to the ground that in the particular case Congress had affirmatively legislated *against* the executive claim. It is clear from his full opinion that Mr. Justice Brandeis regarded the second half (the "horizontal" half) of the necessary and proper clause as requiring much more than the absence of congressional legislation against such an assertion of expedient executive power. Rather, he read the clause as saying that Congress was the judge of the need for such a power and would itself have to provide for that power if the President were to have it at all. Thus, Brandeis observed:

> There is no express grant to the President of incidental powers resembling those conferred upon Congress by clause 18 of Article I, § 8.[54]

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[53] 272 U.S. 52, 293 (1926).

[54] *Id.* at 246.

In elaborating the significance of that observation, Brandeis quoted approvingly the following views of John Calhoun, expressing himself a century earlier in Congress:

> Congress shall have power to make all laws, not only to carry into effect the powers expressly delegated to itself, but those delegated to the Government, or any department or office thereof; and of course comprehends the power to pass laws necessary and proper to carry into effect the powers expressly granted to the executive department. It follows, of course, to whatever express grant of power to the Executive the power of dismissal may be supposed to attach, whether to that of seeing the law faithfully executed, or to the still more comprehensive grant, as contended by some, vesting executive powers in the President, the mere fact that it is a power appurtenant to another power and necessary to carry it into effect, transfers it, by the provisions of the Constitution cited, from the Executive to Congress . . . .[55]

In short, the separation of powers to be respected is that which the Constitution itself establishes, including the sole power of Congress to determine, and to make provision for, incidental (but not indispensable) powers that in *its* view may promote greater efficiency in the executive or judicial departments.[56]

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[55] *Id.* citing 11 Cong. Deb. 553 (1835) (emphasis added). *See also* McReynolds' opinion at 179-81; Holmes, at 177.

[56] *See also* In Re Neagle, 135 U.S. 1, 81-83 (1890) (dissenting opinion):

> The Attorney General . . . maintains . . . that the President . . . is invested with necessary and implied executive powers . . . that many of these . . . are self-executing, and in no way dependent, except as to the ways and means, upon legislation. . . . In reply to these propositions, we have this to say . . . .[O]ne very prominent feature of the Constitution which he [the President] is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of sec. 8, art. 1, in which it is declared that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."
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> This clause is that which contains the germ of all the implication of powers under the Constitution. . . . And that clause alone, conclusively refutes the assertion of the Attorney General . . . .

This was, to be sure, a part of the dissent—and in its later briefs (in *Midwest Oil* and in *Youngstown*) the executive sought to derive from the majority exactly the opposite conclusion. Yet, while there are indeed broad dicta in the majority opinion (135 U.S. at 64-65)(as there are also such *dicta* in In Re Debs, 158 U.S. 564 (1895)), the majority held only that, in its view (contrary to the view of the dissent), specific acts of Congress did themselves authorize the executive action involved in the case.

> But there is positive Law [*i.e.* a specific Act of Congress] investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. 135 U.S. at 68.

There is, moreover, nothing in this that is peculiarly "anti-Watergate" or even "anti-executive." As Brandeis observed in *Myers*, it would affect claims of implied judicial power with equal force. Indeed, most of the early illustrations and uses of the horizontal effect of the sweeping clause related to the judiciary, rather than to the executive. One of these is an early decision of the Supreme Court concerning the contempt power. It was held that while the federal judiciary might have inherent power to impose contempt sanctions for misconduct that threatened the ability of a court to perform its express article III judicial duties, any further reach of judicial contempt power, no matter how generally helpful to the courts or logically conducive to the protection of the national government, must depend strictly upon Congress affirmatively providing for it.[57] Thus, just as a more literal fidelity to the full sweeping clause in

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The dissent in *In Re Neagle* allowed for a single exception to the position that Congress must by statute first make provision for an implied or incidental executive power: namely, in meeting extraterritorial international incidents for which Congress may have made no provision. *Id.* at 84-85. In that respect, the dissent in *In Re Neagle* carries through a dictum by John Marshall in Little v. Barreme, 6 U.S. (2 Cranch) 170, 176 (1804) (in which the holding, however, was that as Congress had anticipated the situation and had, by statute, marked the boundary of permissible executive action, presidential action in excess of the Act of Congress was of no effect and could not serve even to insulate a naval captain who relied in good faith on the executive order from liability for money damages.

The possibility of greater executive discretion in external affairs (even in the absence of enabling legislation by Congress) carries on through United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). *See* Lofgren, *United States v. Curtiss-Wright Export Corp.: A Historical Reassessment*, 83 YALE L.J. 1 (1973). Writing of the *Curtiss-Wright* case in *Youngstown Sheet & Tube v. Sawyer*, Mr. Justice Jackson declared:

> That case does not solve the present controversy. It recognizes internal and external affairs as being in separate categories, and held that the strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegation of power in external affairs. It was intimated that the President might act in *external affairs* without congressional authority . . . . 343 U.S. 579, 636 (1952) (emphasis added).

[57] The United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812). *See also* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); Ex Parte Terry, 128 U.S. 289 (1888); Marshall v. Gordon, 243 U.S. 521 (1917). *See also* Frankfurter & Landis, *Power of Congress Over Procedure in Contempts in "Inferior" Federal Courts - A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1022 (1924). ("As an incident to their being, courts must have the authority 'necessary *in a strict sense*' to enable them to go on with their work.") (emphasis added). In Anderson v. Dunn, *supra*, the Court described the scope of an inherent congressional power of contempt, as an indispensable power to enable the legislature to perform its duties, as "the least possible power adequate to the end proposed." Similarly, dissenting in *Myers*, Brandeis said:

> A power implied on the ground that it is inherent in the executive, must, according to established principles of constitutional construction, be limited to "the least possible power adequate to the end proposed."

272 U.S. at 246-47. For the most recent Supreme Court decision respecting the judicial contempt power, *see* United States v. Wilson, 95 S. Ct. 1802 (1975).

article I (and the notable absence of any equivalent provision in articles II or III) may result in a far more skeptical judicial treatment of the expanse of implied executive powers, so also may it bear upon the judiciary, *e.g.*, in respect to supervisory authority, and as to the scope of contempt, rulemaking, confidentiality, and removal powers.

III. A Closer Look at United States v. Nixon

United States v. Nixon[58] is the most recent case that provides an occasion to show the manner in which the horizontal effect of the sweeping clause might have been (but was not) applied. "Nowhere in the Constitution," the Court noted, "is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."[59] That was so, in the Court's view, because "[c]ertain powers and privileges flow from the nature of enumerated powers;[16] the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."[60]

There is an opaqueness in these spare passages by Chief Justice Burger which is frankly not dispelled by the balance of the opinion. Insofar as one might suppose that footnote 16 would indicate the "enumerated powers" of the President in article II from which the Court believed that executive privilege *did* flow, the footnote is altogether disappointing. What it says is this:

> The Special Prosecutor argues that there is no provision in the Constitution for a presidential privilege as to the President's communications corresponding to the privilege of Members of Congress under the Speech or Debate Clause. But the silence of the Constitution on this score is not dispositive. "The rule of constitutional interpretation announced in *McCulloch v. Maryland,* 4 Wheat. 316, that *that which was reasonably appropriate and relevant* to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it," Marshall v. Gordon, 243 U.S. 521, 537 (1917).[61]

In the context of the whole opinion, these passages seem to suggest the following propositions. First, John Marshall's historic opinion in *McCulloch v. Maryland* sets the proper tone respecting the generous construction of express enumerated national powers that

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[58] 418 U.S. 683 (1974).

[59] *Id.* at 711 (emphasis added).

[60] *Id.* at 705-06.

[61] *Id.* (emphasis added).

ensure that the Constitution is equal to the vicissitudes of time and the great uncertainties of the future. It is "a constitution we are expounding,"[62] is the most durable of all Marshall's memorable aphorisms; a wizened, cramped, penal-code style of judicial construction would be a profound (or ludicrous) mistake. Second, although *McCulloch v. Maryland* itself may have considered only the latitude of congressional power (which is, of course, expressly complemented by the necessary and proper clause, upon which Marshall relied to confirm his view of generous construction), the pertinence of his view of generous construction is self-evident in respect to the express enumerated powers of the President as well. The Executive Department must have its constitutional powers construed with the utmost judicial latitude to be equal to the demands that an uncertain future might impose upon that Department (and upon the Judicial Department) as well as upon Congress. Third, although the Court did not bother to indicate by name any enumerated executive power, whatever incidental executive power might be "reasonably appropriate and relevant to the exercise of [an enumerated executive] power is considered as accompanying the grant."[63] A general privilege of executive confidentiality may obviously be "reasonably appropriate and relevant" to the President in respect to each of his enumerated executive powers, and correspondingly both its existence and scope call "for great deference from the courts." Q.E.D.

That the latitude of incidental ancillary executive powers was deemed by the Court to be the same as the latitude of Congress pursuant to the necessary and proper clause itself, seems evident simply from a comparison of language. Writing of Congress and of the sweeping clause in *McCulloch v. Maryland,* Marshall had rejected the stringent construction ("absolutely necessary" and "indispensably necessary"), and finally concluded:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[64]

In *United States v. Nixon,* the Court, footnoting to *McCulloch* its statements about implied executive powers incidental to enumerated ones, found that whatever "*relates to* the effective discharge"[65]

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[62] 17 U.S. (4 Wheat.) at 407 (emphasis added).

[63] 418 U.S. at 706.

[64] 17 U.S. (4 Wheat.) at 421.

[65] 418 U.S. at 711 (emphasis added).

i.e. whatever may efficiently aid, be logically conducive in connection with, or be expedient in the accomplishment of (and without the felt judicial necessity even to specify which) enumerated executive powers is implied by article II.

For reasons I have now tried to explain (none of which were briefed in the case, addressed in the opinion, or suggested in the many writings on *United States v. Nixon*), however, I think that the supposed equivalence between the latitude of Congress' incidental initiatives and those of the executive, suggested as dictum in *Nixon,* is very doubtful. Moreover, it does not at all follow from Marshall's views in *McCulloch v. Maryland,* either in textual exegesis or in wise and generous policy.

The latitude of legislative power vested in Congress by the sweeping clause, as generously construed by John Marshall, fully assures the constitutional authority of the national government to meet evolving circumstances. Insofar as the judiciary and the executive may be aided by the equipage of ancillary powers "reasonably appropriate and relevant" to their assigned constitutional tasks, that equipage can be provided. The Constitution does not forestall or prevent that development. Rather, it provides for that development exactly as suggested by Marshall in *McCulloch v. Maryland,* by enabling *Congress* to provide any such merely expedient incidental judicial and executive powers as the courts or the President shall thereafter request.

More complete excerpts from Marshall's opinion reflect his own emphasis on Congress:

> [T]he Constitution of the United States has not left the right of *Congress* to employ the necessary means, for the execution of the powers conferred on *the government,* to general reasoning. To *its* enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, *or in any department thereof.*"[66]
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> . . . This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if

[66] 17 U.S. (4 Wheat.) at 411-12 (emphasis added).

> foreseen at all must have been seen dimly, and which can be best provided for as they occur. . . .[67]
>
> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow *to the national legislature* that discretion, with respect to the means by which the powers it confers are to be carried into execution . . . . Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[68]

The reliance by Marshall on the sweeping clause itself, rather than upon a more general rule of construction that powers granted and enumerated in each article were to be treated as carrying in their train a large number of merely appropriate incidental powers, is not limited to his opinion in this case. Fifteen years earlier, in *United States v. Fisher*,[69] he set the tone for *McCulloch,* by construing the sweeping clause and the latitude of discretion it established for *Congress*:

> [I]t has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.
>
> It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof.
>
> *In construing this clause* it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.
>
> Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.[70]

To be sure, each of these cases involved the use of the sweeping clause to sustain an act of Congress in aid of a power enumerated in article

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[67] *Id.* at 415 (emphasis added).
[68] *Id.* at 421 (emphasis added).
[69] 6 U.S. (2 Cranch) 358 (1805).
[70] *Id.* at 396 (emphasis added).

I itself. But Marshall also relied exclusively on the same clause as the necessary of source authority (*i.e.* a legislative authority) to provide for a rule-making power in the judiciary. In *Wayman v. Southard*,[71] the question before the Court was whether rules established by the federal courts respecting the manner in which execution of federal court judgments would be levied by U.S. Marshals could prevail over conflicting rules established by a state. Interestingly, Marshall did *not* find such authority to be vested in the courts by force of article III as an incident of the judicial power, despite the fact that the manner in which a federal court judgment might be carried into effect clearly pertained immediately to the judicial business. Further, although encouraged by plaintiff's counsel to do so, Marshall did not find the source of congressional power to aid the courts in the language of article III.[72] Rather, he located the authority of the federal courts to provide for such rules solely in an act of Congress, which act, in turn, he found to be authorized solely on the basis of the second half of the sweeping clause:

> The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.
>
> That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The court, therefore, will only say, that no doubt whatever is entertained on the power of *Congress* over the subject. The only inquiry is how far has *this* power been exercised?[73]

Wayman v. Southard is made even more significant by the manner in which Marshall responded to the second issue in the case. It was the contention of the defendants that, assuming Congress could

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[71] 23 U.S. (10 Wheat.) 1 (1825).

[72] ". . . such inferior courts as the Congress may from time ordain and establish . . . . The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

[73] 23 U.S. (10 Wheat.) at 22 (emphasis added). For similar reliance upon congressional authorization pursuant to the sweeping clause, *see* Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53-54 (1825); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838); Embry v. Palmer, 107 U.S. 3 (1882); Hanna v. Plumer, 380 U.S. 460, 472 (1965).

provide rules specifying the manner in which federal court judgments were to be executed (and that it could do so pursuant to the sweeping clause), Congress could not delegate the power to the courts so to provide. That, in the defendants' view, would constitute a delegation of legislative power to a non-legislative department, in contravention of the requirement in article I that "all legislative Powers herein granted shall be vested in a *Congress,*" and thus must be exercised by Congress itself.

What is interesting about Marshall's response is its explicit assumption that indeed the power being exercised *is exclusively a legislative one, i.e.* a power solely to be exercised by Congress. Although the power clearly pertained to the judicial business and was in fact very intimate to that business in determining what practical effect would be given to a federal court judgment, Marshall relied on that connection only to show why, under these circumstances, Congress could by statute grant to the courts a limited rule-making power of their own without thereby being guilty of an unconstitutional delegation. His concern with this issue would appear to make no sense at all if one were to assume that the court already possessed an incidental rule-making power of its own which the act of Congress merely confirmed. Rather, Marshall discusses the delegation issue as a deeply troublesome one, and he found the federal court power valid because (a) it was clearly provided for by Congress, and (b) it was provided for something clearly intimate to the operation of the federal judiciary. Thus he finally concluded:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power *given* to those who are to act under such general provisions to fill up the details.[74]

The assumption seems very clear that though the power pertained intimately to the judicial business, *it must be given by Congress* to be exercised, because the sweeping clause so requires. Moreover, when Congress gives it (as distinguished from itself legislating the particular rule), it may do so only in respect to less important subjects and "under such general provisions to fill up the details." A broader delegation would violate the requirement of the sweeping clause that Congress alone is to say to what extent and in what manner the judicial power is to be aided in securing the execution of its judgments.

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[74] 23 U.S. (10 Wheat.) at 43 (emphasis added).

Wayman v. Southard was written in 1825, six years after Marshall's opinion in *McCulloch v. Maryland.* In between, just a few months after *McCulloch,* Marshall had penned a series of anonymous essays in response to newspaper attacks written by two well known judges, Spencer Roane and William Brockenbrough, in his home state of Virginia.[75] Most of the exchange among the three was, understandably, directed to what the Virginia judges regarded as the unwarranted breadth of the construction Marshall had given the sweeping clause in *McCulloch,* Roane and Brockenbrough attacking it as an end to federalism and as a means of nationalizing all power in disparagement of the tenth amendment.[76]

In answering them, Marshall gave examples of the manner in which the sweeping clause was immensely important—not only in its vertical effect, but also in its horizontal operation. And, as in *Wayman,* the discussion would make little sense (if any at all) if Marshall believed that the courts, on their own initiative, could have presumed to assume incidental powers which Marshall locates as the very function of the sweeping clause to provide through Congress:

> The power [of Congress in article III] is to ordain and establish inferior courts, the judges of which shall hold their offices during good behavior, and receive as a compensation for their services, salaries which shall not be diminished during their continuance in office. The second section [in article III] defines the extent of the judicial power.
>
> Is a law to punish those who falsify a [judicial] record, one without which a court cannot be established, or one without which a court cannot exercise its functions? We know that under the confederation Congress had the power to establish, and did establish certain courts, and had not the power to pass laws for the punishment of those who should falsify its records. . . . Unquestionably such a law is "needful," "requisite," "essential," "conducive to,"

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[75] G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (1969).

[76] In view of the fact that Brockenbrough and Roane insisted that the sweeping clause would enable Congress to adopt only such legislation as might be indispensably necessary (as distinct from appropriate and convenient) in the execution of Congress's own enumerated powers, making the clause virtually redundant of each such power, it is interesting to note how very limited a construction they also give to its horizontal effect. They concluded that perhaps the clause's sole function was to permit Congress to provide for (indispensably) necessary incidental powers to the executive and to the judiciary:

> The clause then conveys no grant of powers; it was inserted from abundant caution, or perhaps for the purpose of letting in the power contained in the latter part of the clause, and of vesting in the legislature rather than the other departments the power of making laws to carry into effect the "other powers vested in the government, or in any department or officer thereof."

Id. at 70.

> the due administration of justice; but no man can say it is one without which courts cannot decide causes, or without which it is physically impossible for them to perform their functions. According to the rule of Amphyction [Judge Brockenbrough] then, such a law cannot be enacted by Congress, but may be enacted by the state legislatures.[77]

Again, the explicit assumption is that the sweeping clause is the important clause exactly because, unless it is granted the construction Marshall has given to it, there is no national power at all to provide for things "conducive to" the judicial business. Thus, the courts could not themselves so provide—but *Congress* may, either directly, or by a limited delegation to the courts as in *Wayman*.

In a subsequent essay in response to Roane, Marshall again emphasized the separate importance of the sweeping clause as the proper source of national power (a congressional power), to provide all incidental means of rendering the judicial power fully effective:

> Thus too congress has power "to constitute tribunals inferior to the supreme court."
>
> An act constituting these tribunals, defining their jurisdiction, regulating their proceedings, &c. is not an incident to the power, but the means of executing it. . . . The legislature may multiply or diminish these tribunals, may vary their jurisdiction at will. These laws are means, and the constitution creates no question respecting their necessity. But a law to punish those who falsify a record, or who commit a perjury or subornation of perjury, is an execution of an incidental power; and the question whether that incident is fairly deduced from the principal, is open to argument. Under the confederation congress could establish certain courts; but, having no incidental powers, was incapable of punishing those who falsified the records, or committed perjury within those courts.
>
> In the exercise of an incidental power, we are always to enquire whether "it appertains to or follows the principal;" for the power itself may be questioned; but in exercising one that is granted, there is no question about the power, and the very business of *a legislature* is to select the means.[78]

This, then, seems to me to connect very naturally and well with Mr. Justice Jackson's dictum in *Youngstown,* and so to apply with at least equal force to the executive department as to the judicial department:

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[77] *Id.* at 99.

[78] *Id.* at 173 (emphasis added).

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by *parliamentary* deliberations.[79]

Chief Justice Burger may therefore have erred in *United States v. Nixon,* misreading *McCulloch* as though it spoke at large to some implied necessary and proper clause in articles II and III, conferring an incidental authority equally upon the executive and judiciary, when in fact that powerful case stressed the national indispensability of the clause solely in terms of what it enables Congress to do. In the absence of provision by Congress, then, as Brandeis subsequently implied in *Myers v. United States,* each companionate department of the national government may assert on its own only such incidental authority constituting "the least adequate power"[80] without which the executive or judiciary would be unable to discharge the express (articles II and III) duties constitutionally assigned them.

Additionally, insofar as a given kind or degree of executive or judicial equipage can at best be said to be an eminently reasonable and efficient incident in aid of an executive or judicial power, *e.g.*, the authorization of a general "supervisory" authority over the inferior federal judiciary to be vested in the Supreme Court, it strikes one as exactly the kind of issue appropriately addressed in the first instance to the discretion and debate of political and legislative choice, *i.e.* to Congress. Under these circumstances, it may at best be gratuitous (and at worst unconstitutional) for the Supreme Court itself to presume to be the forum to resolve the arguments in favor of such powers.

Accordingly, a claim of executive (or judicial) privilege that can stand on no firmer footing than that such privilege might be "reasonably appropriate" in light of the President's or the federal courts' constitutional duties should be held to require a basis in some supporting or some authorizing act of Congress—the Department designated by article I to decide such questions. Only when the particular assertion of privilege can fairly be said to be the least adequate power a President (or a federal court) clearly must have to perform express duties enumerated in the Constitution can the claim of privilege be said to stand on its own constitutional ground when it wholly lacks affirmative congressional authorization or enactment.

In this light, incidentally, it was not wrong of the late Professor

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[79] 343 U.S. at 655 (1952) (emphasis added).

[80] See note 57 *supra.*

Alexander Bickel to have disappointed his clients in the Pentagon Papers case by emphasizing the lack of congressional authorization to the executive and to the courts at least equally with the additional first amendment issues presented in that case. The point was not lost on some of the Justices:

> The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power, and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. . . .[81]
>
> At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. . . .[82]
>
> It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government. . . .[83]
>
> There is, moreover, no statute barring the publication by the press of the material which the Times and Post seek to use. . . . So any power that the Government possesses must come from its "inherent power."[84]

Finally, to the suggestion that alleged emergencies, or the occurrences of contingencies so exotic that Congress might not fairly be expected to have anticipated them, might result in a national handicap, Mr. Justice Jackson's response is still well worth recalling:

> The appeal . . . that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers

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[81] 403 U.S. at 718 (Mr. Justice Black).

[82] *Id.* at 732 (Mr. Justice White).

[83] *Id.* at 742-43 (Mr. Justice Marshall).

[84] *Id.* at 720, 722 (Mr. Justice Douglas).

omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. . . . [E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. . . .

In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end.[85]

IV. An Anticlimatic Conclusion

In attempting to explicate a general constitutional requirement of congressional acts to provide for incidental judicial power conducive (but not essential) to performance of the court's duties as described in article III, I have provided several examples. In respect to one of these, *viz.*, the scope of an incidental contempt power, the cases generally conform to what has been suggested: anything broader than a power deemed indispensable to enable a court to proceed with a given case appears to require statutory support. On the other hand, in the example taken from *Bivens v. Six Unknown Named Agents*,[86] no act of Congress furnished the basis for the particular remedy of money damages, and neither did the Court hold that, in the circumstances of the case, no lesser remedy would have been consistent with the duty of the Court to decide the case consis-

[85] 343 U.S. at 649-50, 652-53.

[86] See text *supra*, at note 29.

tently with the fourth amendment. In spite of appearances to the contrary, moreover, a case like *Bivens* is in this respect more troublesome than many others in which the remedy that was fashioned gave rise to enormous public uproar. The remedy in *Swann v. Charlotte-Mecklenberg Board of Education*,[87] for instance, was an extraordinary judicial order, incorporating a complex desegregation plan requiring continuing judicial oversight and monitoring that still continues. Yet there is this difference: in *Swann*, not only could plaintiffs establish jurisdiction in a federal court to hear the case in the first instance by force of an act of Congress[88] (as was true also in *Bivens*);[89] they could also point to a separate act of Congress authorizing the court to grant virtually any appropriate remedy.[90] To be sure, the manner in which the statutory authorization to provide equitable relief was construed in *Swann* was felt by many to go to the very verge of judicial discretion,[91] but it was nonetheless true that the remedy was most immediately anchored in the authorization of that statute. Indeed, this left it somewhat uncertain whether such varieties of desegregation decrees would be regarded as constitutionally indispensable rather than merely appropriate and not forbidden, inviting the abortive effort by President Nixon to persuade Congress to adopt an anti-busing moratorium act.[92]

Would it be correct to say then, that money damages ought not have been provided in *Bivens* absent a specific act of Congress authorizing them, unless the Court was willing to hold that nothing less than money damages would permit it to fulfill its judicial duty to vindicate Webster Bivens' fourth amendment rights? If the provision of not-indispensable remedies can best be characterized as a merely "appropriate" incidental power of the courts, the conclusion certainly

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[87] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[88] 28 U.S.C. § 1343(3) (1970).

[89] 28 U.S.C. § 1331 (1970).

[90] 42 U.S.C. § 1983 (1970).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See also 42 U.S.C. § 1988 (1970) (which explicitly directs the district court to utilize common law remedies insofar as "the laws of the United States . . . are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . ."

[91] *But see* Milliken v. Bradley, 418 U.S. 717 (1974).

[92] Bickel, *What's Wrong with Nixon's Busing Bills?*, THE NEW REPUBLIC, April 22, 1972, at 21.

seems to follow from the argument developed above as to the role of Congress under the second half of the necessary and proper clause.[93]

Yet one cannot be at all confident about such an outcome, for even without holding that the particular remedy must be deemed indispensable[94] to the case over which the Court had jurisdiction, a bevy of lesser alternatives will readily occur to the thoughtful reader.[95] Insofar as the remedy of money damages is itself the single most common remedy of all, and of most long-standing availability within the judicial process, a court might well reason that in the absence of a statute forbidding such a remedy in a particular kind of case, it is to be assumed that Congress acquiesces in its use by the fact of its silence. Alternatively, and still relying on the commonplace nature of money damage remedies, a court might construe the jurisdictional statute empowering the federal courts to hear the case as itself implying a grant of jurisdiction to afford that kind of remedy, treating the power to award this remedy simply as a "lesser-included" power within the power to decide, rather than as an "implied" or "incidental" power. Indeed, with all its provisions for writs, even the original Judiciary Act of 1789[96] spoke with no great explicitness to money damage remedies, and yet no serious question seems to have been entertained as to their availability. Rather, contrary to what a layman might think, *i.e.* that insofar as "jurisdiction" might contemplate merely a power to determine the rights and obligations of the parties but to do no more than that, it is familiar learning that the rendering of a merely declaratory judgment, in contrast with a judgment contemplating money damages, was a remedy deemed so novel as to require an authorizing act of Congress.[97]

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[93] *But see* Bell v. Hood, 327 U.S. 678, 684 (1946): "[W]here federally protected rights have been invaded, it has been the rule *from the beginning* that courts will be alert to adjust their remedies so as to grant the necessary relief." (emphasis added).

[94] The concurring opinion by Mr. Justice Harlan suggests that the money damage remedy might well have been deemed indispensable in the facts of the case (403 U.S. at 409-10: "[I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position."

[95] Again, the concurring opinion by Mr. Justice Harlan (403 U.S. at 402-06) very carefully reviews several bases according to which the Court might properly infer the availability of the remedy from acts of Congress plus the ordinary nature of the remedy itself (as a general matter), the past practice of the Court in analogous circumstances, and the lack of affirmative congressional restriction.

[96] 1 Stat. 73.

[97] *See* 28 U.S.C. §§ 2201-02 (1970). *Compare* Muskrat v. United States, 219 U.S. 346 (1911) (suggesting that a judgment doing nothing more than to declare the legal rights and obligations of the parties may not amount to a "case" or "controversy" within the judicial power as described in article III of the Constitution), *with* Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

My point in raising these matters, however, is not to solve them but to establish that even should the Supreme Court be persuaded to read the sweeping clause in article I with the fuller force I have urged in this brief essay, it will make very little difference if nothing else is altered in the practice of the Court. Indeed, unless the Court takes more seriously the whole range of techniques it has invoked in behalf of the executive, if not in behalf of itself, reliance upon any particular view of any particular clause would be utterly naive.

Even if it were agreed that no purely ancillary executive power not indispensable to the discharge of an express executive duty can be exercised without congressional authorization, pursuant to the sweeping clause, there would remain an endless number of ways of making that point an utterly trivial one. Here, again, are but a few of them as applied specifically to the President:

1. By construing each express executive power with such breadth as to yield the conclusion that what the President claimed in the case at hand was really just a "lesser-included," rather than an "incidental," "implied," or ancillary power;

2. By reviving the claim that in vesting "the executive power of the United States" in a President, the text of article II is different in character from that in article I (which vests only "all legislative Powers *herein granted*" in Congress), and that accordingly the President possesses some executive powers nowhere granted by the Constitution itself at all;[98]

3. By insisting that an incident of executive power is in fact indispensable (and not merely appropriate) to the effective exercise of an express executive power, as Chief Justice Taft presumed to do in *Myers*;

4. By declaring that the mere passivity of Congress in the face of repeated executive action of a given kind amounts to authorization by acquiescence, as the Court did in *Midwest Oil*;[99]

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[98] *But cf.* Mr. Justice Jackson, concurring in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 641 (1952): "I cannot accept the view that his clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." *See also* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

> The opening clause of Article II of the Constitution reads: "The executive Power shall be vested in a President of the United States of America." The records of the Constitutional Convention make it clear that the purposes of this clause were simply to settle the question whether the executive branch should be plural or single and to give the executive a title.

[99] United States v. Midwest Oil Co., 236 U.S. 459 (1915). *See* Saxbe v. Bustos, 419 U.S. 65, 87-88 n.12 (1974) (dissenting opinion, sharply limiting and distinguishing *Midwest Oil*).

5. By construing some act of Congress so broadly as to find within it the authorization the sweeping clause may require, as did the majority in *In Re Neagle*;[100]

6. By requiring so little of Congress in authorizing the President to provide his own rules (and yet not hold that Congress has so far abidicated as to have made an unconstitutional delegation of legislative power) as to encourage the very worst tendencies in Congress itself. In short, one's interest in a particular clause of the Constitution obviously ought not to be exaggerated. That interest cannot be torn loose from a broader perspective of the role of the Supreme Court in arresting the drift of power within the national government.

When one concludes a foray into Farrand, Elliot, Madison's Notes, the Federalist Papers, the anti-Federalist Papers, the Ratification Debates, the early Annals of Congress, and the early cases, even the narrow subject of one's interest is, in this instance, left to reasonable differences of opinion.[101] Moreover, if one sees the larger problem

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[100] 135 U.S. 1 (1890). *See also* In Re Debs, 158 U.S. 564 (1895).

[101] There are at least three views of the clause for which some support can be mustered, and at least two additional interpretations would also be consistent with its language. Briefly, possibilities include all of the following different interpretations:

1. Whether or not an assertion of incidental power by the President may be indispensable to his execution of a specific, enumerated executive power, the President may not act in the absence of authorization by Congress pursuant to this clause.

2. The President has the same latitude of discretion in electing among appropriate means to discharge his enumerated powers as Congress has in respect to its powers, but Congress may, by law, *restrict* the President short of taking from him such means as are indispensable to the performance of his enumerated powers.

3. The enumeration of separate executive powers in article II implies as well such incidental or lesser included powers as may be indispensable to their discharge by the President. A claim of executive power that can stand on no firmer footing than that it would be an efficient or appropriate power in aid of some express executive power, however, must rest upon some supporting act of Congress. It is for Congress to determine whether such power is necessary and proper.

4. This clause means only that insofar as the President may, as a practical matter, need the assistance of Congress "to carry into execution" something the President might wish to do, Congress may provide that assistance (*e.g.*, by appropriating money).

5. The clause means only that insofar as making a *law* would itself be a necessary or proper means of reinforcing the executive will (*e.g.*, by criminalizing a breach of executive confidentiality), Congress has the power to make such a law.

The first construction finds some support in the position represented by Judges Brockenbrough and Roane (in their essay exchange with John Marshall following *McCulloch v. Maryland*), and, to a lesser extent, in the dissent in *In Re Neagle*. See notes 62 and 46 *supra*. The fourth and fifth constructions are certainly compatible with the language of the sweeping clause, and the third construction is the one advanced in this brief essay. Interestingly, the second construction (which best approximates the conventional view of the clause) seems by far the least compatible with the language of the clause itself—for all that that may matter.

Lest the mild intention of this essay be misunderstood, incidentally, there is (in my view) no sufficient evidence of any one "original understanding" of the sweeping clause as to foreclose a large measure of wholly legitimate judicial discretion in its interpretation.

simply as whether Congress could, by adequately asserting itself, readily restore what many might now agree to be a better balance within the national government, there is really no reason to be concerned at all with the "right" construction of the sweeping clause. In answering the question as to what is left to Congress under the Constitution even after one has generously accounted for all plausible powers of the President, for instance, Professor Charles Black has quite rightly observed:

> The answer is just about everything. The powers of Congress are adequate to the control of every national interest of any importance, including all those with which the president might, by piling inference on inference, be thought to be entrusted. And underlying all the powers of Congress is the appropriations power, the power that brought the kings of England to heel. My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the president's staff to one secretary for answering social correspondence, and that, by two-thirds majorities, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true, and the illustrations are useful for making the limits—or the practical lack of limits—on the power of Congress over the president. Last year, in an appropriations bill, they told him to stop bombing Cambodia by August 15, and he stopped. If the will had existed, they could have done much the same thing four, or six or eight tragic years ago—at any time they really had wanted.[102]

From this point of view, the low estate of Congress is due only to its own lack of energy and owes little, if anything, to the manner in which the federal courts have favored claims of executive power during the past five decades. It is a sobering suggestion, and perhaps it is wholly correct.

On the other hand, if one is inclined to see the problem less in terms of what Congress *might* do consistent with its constitutional power, and more in terms of a role for the judiciary in insisting upon what Congress is *responsible* for doing if such things are to be at all (*e.g.*, going into a full scale war, as distinct from finally cutting off its last, pathetic conclusion), the emphasis will be quite different. Viewed from this different perspective, the role of the judiciary in administering the Constitution should include the duty of arresting the very worst propensities of elected representatives to avoid their

[102] Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CON. L.Q. 13, 15-16 (1974).

own constitutional responsibilities.[103] Consistent with that judicial role, the Court must be encouraged to act in more than a single way. The recognition of a greater congressional *affirmative* responsibility, pursuant to the horizontal effect of the sweeping clause, is but one appropriate way of several: to find fewer instances of delegation by mere passive acquiescence, to tolerate fewer instances of delegation of power by nonspecific, *carte blanche* transfers; and, in general, to evidence a less uncritical acceptance of the supposed superiority of an efficient, uncabined imperial Presidency. It was, after all, precisely by way of responding to that tendency that Louis Brandeis reminded us some half-century ago about the constitutional function of separated powers.

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[103] "The problem about Congress is simply this: Not only does it not govern, *it does not want to govern.*" Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers with Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 600 (1973) (emphasis added). (At the time of offering this remark, Professor Miller was serving as Chief Consultant to the Senate Select Committee on Presidential Campaign Activities).